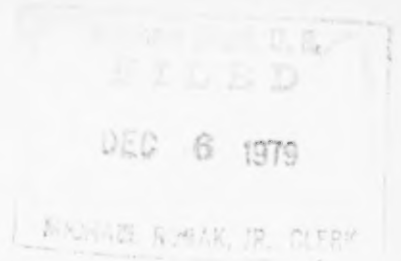


No. 79-612



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In the Supreme Court of the United States

OCTOBER TERM, 1979

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CLAYTON RUNCK, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE EIGHTH CIRCUIT*

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MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION

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WADE H. MCCREE, JR.  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*

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Petitioner contends that he is entitled to withdrawal of his guilty plea rather than to specific performance of the plea agreement because, in initially sentencing him, the district court imposed a condition that was beyond the scope of the plea agreement.

1. On April 17, 1978, petitioner pleaded guilty in the United States District Court for the District of Minnesota to two informations, each of which charged a single count of mail fraud, in violation of 18 U.S.C. 1341. Petitioner and the government agreed that, in exchange for the pleas of guilty, petitioner would receive a sentence of no more than three years' imprisonment and a \$1,000 fine on each count. It was further agreed that the prison terms would run concurrently and that

the government would not prosecute petitioner on other mail fraud charges then under investigation (Tr. 7-9, 28).<sup>1</sup>

After determining that petitioner fully understood the terms of the agreement, the trial judge accepted the guilty pleas (Tr. 24-25, 35-40). The court then sentenced petitioner to two and one-half years' imprisonment and a \$1,000 fine on the first information, to be followed by a consecutive three-year term of probation on the second information. The court also required that petitioner pay restitution of \$40,000 as a condition of his probation. Petitioner moved to amend the sentence on the ground that it did not comport with the plea agreement. In response, the court amended the sentence by making the term of probation concurrent with the sentence of imprisonment. The court also amended the restitution condition by eliminating the requirement that petitioner pay restitution of \$40,000 and ordered petitioner to make restitution in an amount to be set by the probation office.

On appeal, petitioner contended that the imposition of the condition of restitution materially altered the plea bargain and that he therefore should be allowed to withdraw his guilty plea. The court of appeals initially ordered the district court to allow petitioner to withdraw his plea, (Pet. App. 14-23). On rehearing, however, the court withdrew its initial decision, finding that, although the condition of restitution was outside the scope of the plea agreement, the intent of the trial judge to accept the plea was clear (Pet. App. 10-11). The court of appeals

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<sup>1</sup>"Tr." refers to the transcript of the district court proceedings on April 17, 1978, at which petitioner pleaded guilty.

remanded the case to the district court for resentencing so that petitioner could be provided with "satisfaction of the bargain he accepted" (Pet. App. 11).

3. Petitioner contends that he is automatically entitled to withdraw his guilty plea because the district court imposed a sentencing condition that was beyond the scope of the agreement negotiated by petitioner and the government. This contention lacks merit. Moreover, the decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals. Further review is unwarranted.

a. At the outset, we note that the sentence finally imposed by the trial court substantially reflected the terms of the plea bargain. It was agreed that petitioner could be sentenced to as much as three years' imprisonment on each count and that the sentences would be concurrent. Petitioner's sentence of two and a half years' imprisonment on the first count was well within the permissible range of sentencing under the agreement. Although the court conditioned petitioner's concurrent three year probation term on his making some form of restitution, if petitioner elected not to make restitution, his resulting sentence would only be three years' imprisonment the exact maximum sentence petitioner agreed to accept. Under these circumstances, petitioner cannot properly complain that the sentence he received was more than he bargained for.

b. In any event, even if the inclusion of the restitution provision transcended the scope of the plea agreement, petitioner is not automatically entitled to withdraw his guilty plea. As this Court recognized in *Santobello v. New York*, 404 U.S. 257, 263 (1971), whether the appropriate remedy for breach of a plea agreement is withdrawal of the plea or merely resentencing depends

on the circumstances of each case. When, as here, courts have been confronted with added or unperformed terms of a plea agreement, specific performance rather than vacation of the plea has been the usual remedy. *E.g.*, *United States v. Bowler*, 585 F. 2d 851, 856 (7th Cir. 1978); *Palermo v. Warden*, 545 F. 2d 286, 296-297 (2d Cir. 1976), cert. dismissed, 431 U.S. 911 (1977); *Baker v. Finkbeiner*, 551 F. 2d 180, 184 (7th Cir. 1977); *Correale v. United States*, 479 F. 2d 944, 950 (1st Cir. 1973).

The court of appeals correctly determined that specific performance is the appropriate remedy in this case. The sentence on Count One is unaffected by the claimed defect in the sentence on Count Two. And the restitution provision in the sentence on Count Two can easily be removed at resentencing. Whether the district court decides at resentencing that petitioner should receive a three year term of imprisonment on the second count or be placed on probation without any restitution requirement, petitioner will receive no greater sentence than he bargained for. Moreover, in the interim, petitioner has suffered no prejudice as a result of the restitution provision because his sentence on the two counts has run concurrently.

On the other hand, vacation of the guilty plea at this point would unfairly injure the government, which has relied on the agreement by discontinuing the investigation of several suspected offenses by petitioner. See *Santobello v. New York*, *supra*, 404 U.S. at 263; *id.* at 267-268 (Marshall, J.) (concurring in part and dissenting in part).<sup>2</sup> With these considerations in mind, the court of appeals correctly remanded this case for resentencing.

<sup>2</sup>The plea agreement included a promise by the government not to prosecute other mail fraud offenses that were being investigated at the time of the plea negotiations. In compliance with this

There is no merit to petitioner's claim that specific performance of a plea agreement is never appropriate when noncompliance with the agreement is the result of judicial failure to advise the defendant of an unconsented addition of a sentencing provision under Fed. R. Crim. P. 11(e)(3).<sup>3</sup> This is not a case where the trial judge wholly disregarded the provisions of Rule 11. Rather, as the court below correctly held (Pet. App. 10-11), the district judge fully intended to accept the guilty plea under Rule 11 and his inclusion of the probation condition manifested at most a misinterpretation of the agreement that had been negotiated by the parties.

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undertaking, the government terminated its investigation of petitioner's involvement in a fire insurance scheme stemming from a fire in a building on March 24, 1973. Inasmuch as the five-year period of the applicable statute of limitations has now expired, the government may be precluded from prosecuting petitioner for this suspected offense even if the agreement is rescinded and further investigation establishes that prosecution is warranted.

The government also relied upon the plea agreement in another way. On February 7 and February 9, 1979, after obtaining a grant of immunity, the government questioned petitioner before a federal grand jury investigating the involvement of petitioner's accomplice in the mail fraud schemes. As the result of this grand jury appearance, the government would bear a substantial burden at retrial to demonstrate not only that petitioner is guilty beyond a reasonable doubt, but also that the evidence used at trial was obtained independently and not as the result of the immunized testimony. See *Kasigar v. United States*, 406 U.S. 441, 461-462 (1972); *United States v. McDaniel*, 482 F. 2d 305, 311-312 (8th Cir. 1973).

<sup>3</sup>Rule 11(e)(3) provides:

If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.